No. 86-754

In the Supreme Court of the United States

October Term, 1986

ROYAL CENTER, INC.,
Petitioner,
vs.
LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, CULINARY WORKERS UNION, LOCAL 226, AND BARTENDERS UNION, LOCAL 165,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL STATEMENT OF FACTS

RCI[1] and the Joint Board[2] were parties to a collective bargaining agreement which was effective, by its terms, from April 2, 1980 through and including April 1,

[1] Petitioner Royal Center, Inc.
[2] Respondent Local Joint Executive Board of Las Vegas.

1984, and thereafter if neither party moved to terminate. (Petition, Appendix D 4, para. 2). All the events concerning the suspension of operations by RCI, the sale of its business to a limited partnership it formed, and the resumption of operations by the limited partnership, occurred within the stated term of the agreement.

After operations were resumed in November, 1983, the Joint Board filed this action against RCI in December, 1983. (Petition, Appendix C 4). The Joint Board sought to compel arbitration of two grievances which were alternative in character. The first grievance was that RCI violated Section 29.02 of the agreement by selling its business without obtaining a written assumption of the areement from the buyer. The second was that no bona fide, arms-length sale of the business had actually taken place, and that the business was being operated by 305[3] as an alter ego of RCI. (*Id.*). 305 was not joined as a party, and no relief was sought as to it.

Section 29.02 of the collective bargaining agreement provides that in the event the employer sells or assigns his business, a condition to any such sale, assignment or transfer of ownership is that the employer will obtain from the successor or successors in interest a written assumption of the collective bargaining agreement. (Petition, Appendix D 4 para. 5).

As to the alter ego grievance, the preamble to the agreement states that it is made and entered into by and between the Joint Board and between the Joint Board and RCI, and RCI's successors and assigns. (Petition, Appendix D 4, para. 4).

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[3] 305 Convention Center Drive, LP.

ARGUMENT

I.

THE NINTH CIRCUIT ADHERED TO THE WELL-ESTABLISHED PRINCIPLES REITERATED IN AT&T

As this Court stressed in *AT&T Techonologies, Inc. v. Communications Workers*, __ U.S. __, 106 S.Ct. 1415 (1986), the principles it used to decide that case were "not new" (*Id.* at 1418): rather they had long ago been established in the *Steelworkers Trilogy*. The concurring Justices agreed that "we simply reaffirm established principles." (*Id.* at 1422). All four principles reiterated by the Court were recognized and applied by the Court of Appeals in its decision on remand in the instant case.

First, this Court noted that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Id.* at 1418, citing *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). Second, the Court emphasized that "[u]nless the parties clearly and unmistakably provide otherwise, the question of whether the parties agree to arbitrate is to be decided by the court, not the arbitrator." *Id.* at 1418, citing *Warrior & Gulf, supra,* and *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962), overruled in part on other grounds, *Boys Markets, Inc. v. Retail Clerks*, 398 U.S. 235 (1970).

This Court of Appeals found that it had two central issues before it: (1) "Did the arbitration clause survive the closure of RCI's operations and termination of the collective bargining agreement?," and (2) "Do the

grievances fall within the scope of the arbitration clauses?" 976 F.2d 1159 at 1161-1162. The court stated that both issues were a matter solely of contract:

> "Like the survivability issue, the question of the scope of the arbitration duty is 'a matter to be determined by the Court on the basis of the contract.' *John Wiley*, 376 U.S. at 547, citing *Atkinson v. Sinclair Refining Co.*, 370 U.S. 2328, 241 (1962)."

796 F.2d at 1162.[4] This passage makes it amply clear that the court was adhering to the two connected principles reiterated in *AT&T:* a duty to arbitrate only arises as matter of contract, and it is for the courts to determine whether such a duty exists. The entire approach of the court's opinion was to determine whether RCI was bound by a contractual duty to arbitrate the grievances.

The Court of Appeal's opinion also strictly followed the *AT&T* Court's third and fourth principles: "[t]he courts have no business weighing the merits of the grievance;" and "there is a presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *AT&T* at 1419 (citation omitted).

The Court of Appeals quoted exactly the same language as that quoted by this Supreme Court. 796 F.2d at 1162. Moreover, the citation was more than ritual:

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[4] It is notable that this Court in *AT&T* quoted the same passage from *Wiley*, and also cited *Atkinson*.

the opinion followed the presumption of arbitrability as to both survivability and scope. There was, and is no evidence—forceful or otherwise—of an intent by the collective bargaining parties to exclude these issues from arbitration. Indeed, this court found the very opposite to be true. As its opinion stressed, a contract clause requiring the employer to bind its successor to be labor contract would be meaningless if a closure extinguished the duty to arbitrate over a sale which violated this contract provision. Many if not most sales of businesses involve a period of shutdown in order to make the transition. Plainly the the parties intended that their contract be enforceable through arbitration after closure of the Employer's facility. *Id.* at 1163.

II.

THE ERROR COMMITTED BY THE SEVENTH CIRCUIT IN AT&T—ALLOWING THE ARBITRATOR TO DETERMINE THE SCOPE OF HIS OWN JURISDICTION—WAS NOT COMMITTED BY THE NINTH CIRCUIT

In *AT&T*, there was no issue of survival of contract provisions. Rather, the sole issue was the scope of the duty to arbitrate, in light of two contract clauses specifically addressing that issue. Both the district court and Seventh Circuit abdicated their roles, leaving the issue of arbitrability to the arbitrator.

By contrast, the Ninth Circuit squarely addressed the only question raised by RCI: whether its duty to arbitrate had been extinguished by plant closure. The court also squarely decided that the grievances fell within the scope of the arbitration clause, though RCI had not challenged this fact. Neither conclusion in any

way gave the labor arbitrator "the power to determine his own jurisdiction." *AT&T* at 1420 (citation omitted). Neither conclusion allowed the arbitrator "to impose obligations outside the contract limited only by his understanding and conscience." *Id.*

Nor did the court ignore "the function of a collective bargaining agreement as setting out the rights and duties of the parties." *Id.* Indeed, RCI's position in the instant case seeks to encourage the courts to commit this very error. RCI relied on naked policy arguments in asking the court to tear up a labor agreement because that agreement allegedly "saddles the new operation with an agreement ill fitting its operational needs." 796 F.2d at 1164. The Court of Appeals correctly refused to entertain such a challenge, adhering to this Court's focus on the collective bargaining agreement alone as "setting out the rights and duties of the parties." *AT&T* at 1420.

III.

THE LAW IS CLEAR THAT CLAIMS ARISING UNDER A COLLECTIVE BARGAINING AGREEMENT BUT BASED ON EVENTS OCCURRING AFTER EXPIRATION OF THE AGREEMENT ARE ARBITRABLE.

As the Court suggested in *Nolde Bros., Inc. v. Bakery and Confectionery Workers Union*, 430 U.S. 243, 97 S.Ct. 1067 (1977), the obligation to arbitrate issues arising from actions taken by an employer during the term of a collective bargaining agreement is so obvious that no one before this has questioned it. *Id.*, 430 U.S. at 249-250. There has, however, been considerable litigation of the more dificult question whether events

occurring *after* the termination of a collective bargaining agreement may give rise to arbitrable issues under the expired agreement. With the exception of the pre-*Wiley* case cited by RCI, *Fraser v. Magic Chef,* 324 F.2d 853 (CA6 1963), the answer has been uniformly affirmative. The result is that even if RCI is right that the suspension of its operations terminated the agreement (see section IV, pp. 11-14), it does not follow that issues arising from the subsequent sale or resumption of operations are not subject to arbitration.

In *Piano & Musical Instrument Workers, Local 2549 v. W. W. Kimball Co.,* 333 F. 2d 761 (CA7), reversed per curiam, 379 U.S. 357, 85 S.Ct. 441, 13 L.Ed.2d 541 (1964), the court of appeals held that because the collective bargining agreement expired before the employer shut down its plant and moved operations to another state, union claims that employees' contractual seniority rights were violated when they were not transferred to the new plant were not arbitrable. This Court reversed and remanded, citing *Steelworkers v. American Manufacturing Co.,* 363 U.S. 564 (1960), and *Wiley, supra.* Neither of the cases cited involved actions taken by an employer *after* the expiration of an agreement, so the import of *Kimball* was to extend the presumption favoring arbitration to such actions.

This approach was made very explicit in *Nolde Bros., supra.* The Court held that a union could compel arbitration of employee rights which it claimed were triggered by plant closure occurring *after* the expiration of the collective bargaining agreement. The Court could

see "no reason why parties could not if they so chose agree to the accrual of rights during the term of an agreement and their realization after the agreement had expired." *Id.* at 243, quoting *Wiley, supra,* 376 U.S. at 555. The claim that the Court ordered to be arbitrated in *Nolde* was that employees were due severance pay upon the closing of the employer's plant, in accordance with the terms of the expired collective bargaining agreement.

The Court held that the presumption of arbitrability extends to issues which are alleged to arise under the collective bargaining agreement, but which occur because of events after the termination of the agreement. This is true unless the arbitrability of such issues is "negated expressly or by clear implication" in the agreement. *Id.* at 252-253, 255. RCI points to no such exclusionary language in its collective bargaining, and there is none.

Nolde Bros. answers all of the questions raised by RCI here. To the extent it would distinguish *Nolde Bros.* by relying on the hiatus between the termination of the collective bargaining agreement and the subsequent actions about which the union complains, its arguments are turned back by the extensive work by the Court of Appeals for the Third Circuit in this area. *United Steelworkers of America v. Fort Pitt Steelcasting Division-Conval-Penn, Inc.*, 635 F.2d 1071 (CA3 1980), certiorari den., 451 U.S. 985, 101 S.Ct. 2319, 68 L.Ed.2d 843 (1981) was the first case in a series

presenting the issue of the arbitrability of claims concerning a plant closure occurring many months after termination of the collective bargaining agreement under which the claims are made. In *Fort Pitt*, the plant was closed nine months after the agreement terminated. *Id.* at 1074. The employer there, recognizing that under *Nolde Bros.*, "the parties must arbitrate claims that arise under the contract, but are based on events occurring after its termination" (*Id.* at 1075), attempted to distinguish *Nolde* by pointing to the lapse of time between the end of the contract and the plant closure. The Court of Appeals rejected this attempt, emphasizing that the union promptly made its claim after the event, the plant closure, giving rise to the claims. *Id.* at 1078. The court therefore ordered arbitration of six grievances covering such matters as severance pay, vacation pay, cancellation of retirees' life insurance coverage, deduction of social security benefits from retirees' pension benefits, and the refusal to pay supplemental unemployment benefits to terminated employees. *Id.* at 1074-1075. *Fort Pitt* was followed, in very similar situations, in *Steelworkers v. American Smelting, Inc.*, 648 F.2d 863 (CA3 1981) and *Federated Metals Corp. v. Steelworkers*, 648 F.2d 856 (CA3 1981). *See also United Rubber, Cork, etc. Workers v. Interco, Inc.*, 415 F.2d 1208 (CA8 1969); *Monroe Sander Corp. v. Livingston*, 377 F.2d 6 (CA2), certiorari den., 389 U.S. 831 (1967). *Cf. O'Connor Co., Inc. v. Carpenters Local 1408*, 702 F.2d 824 (CA9 1983) (labor dispute arose following termination of the agreement, but was not covered by the agreement).

Therefore, even assuming that RCI's suspension of operations in March, 1982 did terminate the collective bargaining agreement, that does not advance RCI's cause in the slightest. Like reemployment rights (*Kimball*), severance pay (*Nolde Brothers*), vacation, retirement and unemployment benefits (*Fort Pitt*), the right of employees to be protected against loss of their seniority, accrued longevity-based vacation rights and other rights and benefits under the collective bargaining agreement when a new owner takes over, is a bundle of rights which accrues under the agreement. When, after the assumed termination of the agreement with the Joint Board, RCI sold the business without requiring assumption of the agreement by the new owner, it arguably violated the employees' rights under the agreement, which is a matter for arbitration.

This situation is just the same as in *Nolde Bros, supra,* where the Court ordered arbitration of the question whether employees' rights to severance pay upon termination were violated when the business was closed and employees were terminated *after* expiration of the agreement. It is also the same as in *Fort Pitt, supra,* where the employer was ordered to arbitrate whether it violated a lengthy list of employee rights under a collective bargaining agreement when it closed its plant, even though the closure occurred nine months after the agreement terminated.

What RCI has attempted here would have many unfortunate consequences, which have been anticipated and repudiated by this Court. In *Nolde Bros.*, the Court stated:

> "Any other holding would permit the employer to cut off all arbitration of severance-pay claims by terminating an existing contract simultaneously with closing business operations."

Id. at 253. Here, RCI claims that plant closure *in itself* efffects contract termination, and cuts off rights to arbitration. The Court has already blocked this easy avenue to escape from obligations to employees solemnly undertaken in the collective bargaining agreement. The way unblocked, any employer could escape its collective bargaining agreement whenever it wished, by the simple expedient of closing for some period of (RCI has *never* explained how long that should or must be), terminating its employees, and then taking actions prohibited by the agreement.

IV.

CESSATION OF OPERATIONS DOES NOT TERMINATE THE COLLECTIVE BARGAINING AGREEMENT.

A. Decisions Under Section 301 (a).

The only decision by this Court in which the question of plant closure during the term of a collective bargaining agreement is discussed in *John Wiley & Sons, Inc. v. Livingston, supra.* There, one book publisher with a union contract closed its plant as a result of a merger with a larger, non-union publisher. The merged company's employees were transferred to work in the surviving company's plant. The plant closure took place during the term of an existing collective bargaining agreement. Although the question in *Wiley* was whether the surviving company was obligated to arbitrate under

the merged company's agreement, the Court had the opportunity to discuss the effect of the changes on the agreement. The Court held that while the changes may have extinguished the duty to bargain, they did not have the same effect on the collective bargaining agreement. *Wiley*, 376 U.S. at 551, fn. 5.

Additionally, there is dictum in *Nolde Bros, supra,* that reveals clearly the views of the Court on this issue. The question in *Nolde* was whether a union could compel arbitration of its claims arising out of the closure of the employer's plant after the expiration date of the collective bargaining agreement. In the course of deciding this question, the Court considered what would happen if the closure occurred *prior* to the expiration of the agreement, and had this to say:

> "There can be no doubt that a dispute over the meaning of the severance pay clause during the life of the agreement would have been subject to the mandatory grievance-arbitration procedures of the contract. Indeed, since the parties contracted to submit 'all grievances' to arbitration, our determination that the Union was 'making a claim which on its face is governed by the contract' would end the matter had the contract not been terminated prior to the closing of the plant."

Id. at 249-250. *See Wiley, supra,* 376 U.S. at 554 ("Claimed rights during the term of the agreement, at least, are unquestionably within the arbitration clause; . . .").

RCI does not discuss these critical aspects of *Nolde Bros.* and *Wiley*. It cites only *Fraser v. Magic Chef-Food Giant Markets, Inc.*, 324 F.2d 853 (CA6 1963) on this point. (Petition, p. 19). *Fraser* was decided before *Wiley*, and was manifestly contrary to the principles of *Warrior & Gulf, supra*, which was not mentioned by the court. It ruled on the merits of the grievance, and refused to compel arbitration because it regarded the grievance as lacking merit. This was, of course, an entirely improper, discredited approach. The Supreme Court was not requested to review the decision.

B. Decisions of the Labor Board

In *Steiner Trucraft, Inc.*, 237 NLRB 1079 (1978), enf'd without opinion, 87 Labor Cases para. 11,593 (CA3 1979), the Labor Board was faced with a situation where an employer negotiated a collective bargaining agreement, but closed its plant before the agreement was executed. The employer refused to either execute the collective bargaining agreement that had been negotiated, or to implement or abide by its terms. The Labor Board held that the plant closure did not affect the employer's obligation to abide by the collective bargaining agreement. The Board stated:

> "As to Respondent's failure or refusal, after the closing of its facility, to continue to implement the terms and conditions of the January 13 agreement, it is well recognized that certain employee rights and benefits contained in a collective-bargaining agreement, i.e., severance pay, vacation pay, and pensions, are not automatically terminated by the expiration or ter-

> mination of the contract. *John Wiley & Sons v. Livingston,* 376 U.S. 543 (1964). Similarly, a contractual duty to arbitrate is not automatically extinguished by the termination of the contract, and the parties to such a contract continue to have the duty to process grievances and arbitrate disputes that involve rights or benefits which accrue or vest during the contract's terms. *Nolde Brothers, Inc. v. Local No. 358 Bakery & Confectionery Workers Union, AFL-CIO,* 430 U.S. 243 (1977)."

Id. at 1081.

V.

THE JOINT BOARD DOES *NOT* SEEK TO COMPEL ARBITRATION BY A NON-PARTY TO THE COLLECTIVE BARGAINING AGREEMENT.

The Joint Board does not seek to compel a non-party to the collective bargaining agreement to arbitrate any question under that agreement. The only party to this processed is RCI, which admits that it was a party to the agreement. The Union has not made 305 Convention Center Drive a party in this action.

The issue here is whether *RCI* should be compelled to submit to arbitration. The claim made by the Union is that RCI violated the collective bargaining agreement. This is parallel to *Howard Johnson Co. v. Detroit Joint Board,* 417 U.S. 249, 94 S.Ct. 2236, 41 L.Ed.2d 46 (1974). In *Howard Johnson,* there was a *bona fide,* arm's-length sale of personal property used in a hotel-restaurant business, and a lease by the seller to the

buyer of real property used in the business. The Union sought to compel arbitration of an alleged breach of the collective bargaining agreement by *both* the seller and the buyer, due to the buyer's refusal to adhere to the agreement or to hire many of the seller's employees. The seller in *Howard Johnson,* RCI's counterpart, admitted its obligation to arbitrate, and this was given by the Court as one of the reasons why the buyer should not be required to arbitrate. *Id.* at 253, 257-258.

The Union does not seek to show in arbitration, under either of its theories, that any entity separate from RCI is bound to RCI's agreement. The Joint Board's contentions are in the alternative, and both of them have to do with RCI itself.

The first theory is that RCI violated Section 29.02 of the collective bargaining agreement when it sold to 305 Convention Center Drive. This theory assumes the truth of what RCI claims is the nature of that transaction: an arm's-length *bona fide* sale. It is predicated not on any claim that 305 Convention Center Drive is obligated to the terms of the collective bargaining agreement, but rather on the claim that RCI should have required 305 Convention Center Drive to assume the collective bargaining agreement, and violated section 29.02 by not doing so.

The second, alternative claim is that *RCI* continues to conduct the business under the guise of a combination of itself and 305 Convention Center Drive. If the union's alter ego theory succeeds, and the arbitrator

finds that there has been no real change in the employing entity, then by definition there is no question of a new, different, unconsenting employer being held to the agreement. *See Howard Johnson, supra,* at 259, fn. 5. This case is utterly unlike *AT&T Information Systems v. Communications Workers Local 1300,* 797 F.2d 147 (CA3 1986), relied on so heavily by petitioner. There the union sought to compel a non-party to arbitrate. Furthermore, no allegation was made of alter ego status.

VI.

THE DECISION OF THE NLRB's GENERAL COUNSEL NOT TO ISSUE A COMPLAINT IS AN EXERCISE OF PROSECUTORIAL DISCRETION NOT ENTITLED TO ANY ISSUE-PRECLUSIVE EFFECT.

As a general rule, decisions of a tribunal are given issue-preclusive effect only as to issues which have been fully and fairly litigated by the interested parties. *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 332, 99 S.Ct. 645, 58 L.Ed. 2d 552 (1979). In the procedure of the National Labor Relations Board, the decision to dismiss an unfair labor practice charge is not the culmination of litigation, but rather is a determination that there will be no litigation. It is established that such a decision has no issue-preclusive effect. *Miller Brewing Co., v. Brewery Workers Local Union No. 9,* 739 F.2d 1159 (CA7 1984); *Edna H. Pagel v. Teamsters, Local 5995,* 667 F.2d 1275, 1279-81 (CA9 1982); *United Steelworkers of America v. Fort Pitt Steelcasting Division-Conval-Penn, Inc.,* 635 F.2d 1071, 1080 (CA3 1980), certiorari den., 451 U.S. 985, (1981); *Paramount Transportation*

System v. Teamsters, Local 150, 436 F.2d 1064 (CA9 1971). The decision not to issue a complaint is simply the exercise of prosecutorial discretion. *Miller Brewing Co., supra.*

In the procedure followed by the National Labor Relations Board, when an unfair labor practice charge is filed it is investigated administratively by the Regional Director in whose area the charge arose. The Regional Director acts as the delegate of the Board's General Counsel. The General Counsel is the Board's prosecutorial arm. 29 C.F.R. Sections 202, 203.1. Evidence concerning an unfair labor practice charge is taken by the Regional Director from the charging and charged parties privately. There is no opportunity to hear the opposing party's evidence, much less to confront and cross-examine witnesses. There is no opportunity to subpoena witnesses or documentary evidence. The charged party is not even obligated to cooperate with the Regional Director's investigastion. 29 C.F.R. Section 101.4; NLRB Casehandling Manual Sections 10056, 10058.

The decision of the Regional Director may be appealed to the General Counsel. It is established that the General Counsel has wide prosecutorial discretion, and the decision whether or not to issue complaint is not judicially reviewable. *Vaca v. Sipes,* 386 U.S. 171, 182 (1967).

The decision of an NLRB Regional Director not to issue complaint is no different, and is entitled to no

greater weight, than a decision not to prosecute made by a district attorney, the United States Attorney, the Federal Trade Commission, etc.

In this case, the General Counsel decided not to issue a complaint on the charges filed by the union contemporaneously with the filing of this action. There was no hearing, only an administrative investigation culminating in an exercise of prosecutorial discretion. The General Counsel, through the Regional Director, gave reasons for the decision not to issue complaint, which is typical, but did not and could not make any findings on issues of fact or law fully and fairly litigated between the parties.

There is not the conflict or confusion on this point that RCI suggests. Some cases have held that the refusal to issue complaint, while not issue-preclusive, may be given evidentiary weight. *Smith v. Local 25, Sheet Metal Workers International Association,* 500 F.2d 741 (CA5 1974); *Thomas v. Consolidated Co.,* 380 F.2d 69 (CA4 1967). In the principal case relied upon by RCI for the proposition that there is conflict, *Carpenters Local 1478 v. Stevens,* 743 F.2d 1271, 1278-1279 (CA9 1984), an entirely different question was presented. In *Stevens,* the issues deemed precluded were decided by the Labor Board after a representation hearing, in which the parties had the opportunity to, and apparently did, fully and fairly litigate the issues. Therefore, it is fully distinguishable from this case on a point of fundamental legal significance.

RCI's effort to induce a departure from settled doctrine in this case is based on erroneous concepts. It repeatedly suggests in its petition, while never saying it straightforwardly, that the Joint Board is somehow bound to the General Counsel's point of view by an election of remedies. But "whether particular conduct constitutes an unfair labor practice is a distinct question from whether [an employer] must arbitrate a grievance resulting from such conduct." *United States Steelworkers of America v. Fort Pitt, supra* at 1080.

Labor Board proceedings and contractual arbitrations are governed by completely different sources of law. The Labor Board proceedings are, of course, governed by the Labor Management Relations Act. But arbitrations are, and must be, governed by the private law of the parties' collective bargaining agreement. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). The interpretation and enforcement of such agreement is entrusted to the courts, not the Board. *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 427 (1967).

Here, the Board's General Counsel decided not to pursue a complaint to impose upon RCI or 305 a continuing obligation to bargain with the Joint Board. Contrary to RCI's suggestion, the General Counsel did *not* purport to free RCI from its obligations under the existing collective bargaining agreement. (*See* Petition, Appendices E and F). Thus, RCI's suggestion of an intolerable conflict is unfounded. The issues before the

NLRB and arbitration are superficially similar, but the governing sources of law are different. This is not forum shopping, for the Joint Board has pursued *independent* rights in the proper forum for each.

This is also not a case of a disappointed litigant turning to a different forum. The Joint Board pursued its separate remedies simultaneously, and in fact won in the District Court before it lost its appeal to the General Counsel.

VII.
CONCLUSION

The petition should be denied.

Dated: December 8, 1986.

Respectfully submitted,

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